No. 76-629

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1976

C. CAREY MATTHEWS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
*Acting Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

MERVYN HAMBURG,
JOHN H. BURNES, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-11) is reported at 533 F. 2d 900. The opinion of the district court (Pet. App. A-1 to A-7) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 9, 1976, and a petition for rehearing was denied on August 6, 1976 (Pet. App. A-20). The petition for a writ of certiorari was filed on November 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the inquiry conducted by the district court prior to accepting petitioner's guilty plea established an adequate factual basis for the plea.

## STATEMENT

1. An indictment filed on October 31, 1971, in the United States District Court for the Southern District of Florida charged petitioner and four other persons with multiple violations of the Securities Act of 1933 and the Securities and Exchange Act of 1934 in connection with a scheme to defraud policyholders, claimants, agents, creditors, and public minority stockholders of State Fire and Casualty Company, a Florida corporation engaged in the insurance business. On January 7, 1972, pursuant to a plea bargain whereby the remaining counts of the indictment would be dismissed and the government would recommend a sentence of five years' probation, petitioner sought to withdraw his plea of not guilty and to enter a plea of guilty to one count of the indictment (Pet. App. A-1).

Before accepting a guilty plea to Count 14, which charged petitioner with causing the distribution of a false and misleading proxy statement, in violation of 15 U.S.C. 78j(b) and 78ff(a) and 18 U.S.C. 2, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. At the outset, defense counsel stated that although petitioner did not believe that he had committed a crime, he wished to enter a plea of guilty in accordance with this Court's decision in *North Carolina* v. *Alford*, 400 U.S. 25. The court advised petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses and the privilege against self-incrimination. Petitioner, an attorney, replied that he understood these consequences and that his decision to plead guilty was a free and voluntary one that was based solely on the circumstances of the case, his concern for his family, and the probable expenses of trial (Pet. App. A-13 to A-17).



The government then called David Ross, an attorney with the Securities and Exchange Commission who had conducted an investigation of petitioner's relationship with State Fire, to establish a factual basis for the plea. Ross testified that the investigation revealed that on or about January 10, 1968, petitioner, who was the vice president, general counsel and a director of State Fire at the time, had caused the mails to be used to distribute a proxy statement that failed to include certain material information regarding postponement of a recapitalization plan for the company. Ross also stated that the other factual allegations in Count 14 were established by his personal investigation (Pet. App. A-17 to A-19). Petitioner did not challenge any portion of this testimony and specifically declined to cross-examine Ross (*id.* at A-19). Following this evidentiary presentation, the court concluded (App., *infra*, p. i):[1]

> THE COURT: Well, the Court, being satisfied that there is a factual basis for the charges contained in Count 14 of the indictment, and being further of the opinion that the defendant does understand the nature and the consequences of these proceedings, and recognizing the agreement that has been announced by counsel and the statement made by the defendant, hereby accepts the defendant's plea of guilty to the charges contained in Count 14 and now adjudges the defendant, C. Carey Matthews, guilty of the charges contained in Count 14 of the indictment.

On January 26, 1972, petitioner was sentenced in accordance with the plea agreement.

2. More than three years after his conviction, on June 10, 1975, petitioner filed a motion to vacate his sentence

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[1] Appendix C to the petition fails to include the last two pages of the transcript of petitioner's Rule 11 proceeding. Accordingly, we are appending the remaining pages to this brief.

pursuant to 28 U.S.C. 2255, contending that his guilty plea had been coerced and that there had been an insufficient factual basis for the plea. The district court denied the motion without an evidentiary hearing, finding that the transcript of the guilty plea proceeding established that the plea had been freely and voluntarily made and that it was supported by a sufficient factual basis (Pet. App. A-1 to A-7).

The court of appeals reversed and remanded. Although it agreed with the district court that there was no merit to petitioner's contention regarding the factual basis for his plea, the court of appeals concluded (Pet. App. A-9 to A-11) that petitioner was entitled to an evidentiary hearing on the claim that his plea had been coerced by a threat, allegedly conveyed by the Assistant United States Attorney, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury.[2]

## ARGUMENT

1. The petition should be denied as premature. Since the court of appeals has remanded the case to the district court for an evidentiary hearing on the voluntariness of petitioner's guilty plea, review of petitioner's contentions regarding the factual basis for that plea would be inappropriate at this stage. If the district court determines that the plea was coerced, the conviction would be vacated and petitioner would be allowed to plead anew. *Machibroda* v. *United States*, 368 U.S. 487, 493. If, on the other hand, the district court determines that the plea was freely and voluntarily entered, petitioner thereafter will have an adequate

[2]Although petitioner had expressly denied the existence of any threats at his guilty plea proceeding, the court held that he was nevertheless entitled to an evidentiary hearing in light of the affidavits filed by petitioner's counsel and his law partner that corroborated the allegations in his Section 2255 motion.



opportunity to appeal that finding to the court of appeals and, if necessary, to seek review in this Court both of the voluntariness of and the factual basis for the plea. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365, n. 1; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258.

2. In any event, the court of appeals properly rejected petitioner's claim that the district court violated Rule 11, Fed. R. Crim. P., by failing to develop a sufficient factual basis for the plea. Even assuming that a failure to comply with this requirement of a rule of criminal procedure would entitle petitioner to relief under Section 2255,[3] it is clear that Rule 11 was satisfied. All that Rule 11 requires is that the district court's inquiry be "factually precise enough and sufficiently specific to develop that [the defendant's] conduct on the occasions involved was within the ambit of that defined as criminal." *Jimenez* v. *United States*, 487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See *United States* v. *Davis*, 516 F. 2d 574, 577-578 (C.A. 7). Here, the government presented the testimony of the S.E.C. attorney who had conducted the investigation that led to petitioner's indictment. The attorney's unchallenged summary of the results of that investigation sufficiently established the factual allegations contained in Count 14 of the indictment and constituted adequate compliance with Rule 11. See *United States* v. *Bethany*, 489 F. 2d 91 (C.A. 5). Contrary to petitioner's contention (Pet. 14-15, 27-28, 34), the court was not required to make an in-depth examination of the facts underlying each element of the offense.[4]

[3]We believe that it would not. See *Davis* v. *United States*, 417 U.S. 333, 346; *McRae* v. *United States*, 540 F. 2d 943 (C.A. 8), certiorari denied, No. 76-5435, January 10, 1977; *Bachner* v. *United States*, 517 F. 2d 589 (C.A. 7).

[4]Although petitioner claims that there was no evidence of his criminal intent, this element of the crime frequently cannot be shown by direct evidence and may be inferred from the other evidence adduced.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

MERVYN HAMBURG,
JOHN H. BURNES, JR.,
*Attorneys.*

JANUARY 1977.



## APPENDIX

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

THE COURT: Well, the Court, being satisfied that there is a factual basis for the charges contained in Count 14 of the indictment, and being further of the opinion that the defendant does understand the nature and the consequences of these proceedings, and recognizing the agreement that has been announced by counsel and the statement made by the defendant, hereby accepts the defendant's plea of guilty to the charges contained in Count 14 and now adjudges the defendant, C. Carey Matthews, guilty of the charges contained in Count 14 of the indictment.

I would like to refer this matter to the Probation Department for a presentence investigation, but I would certainly state on the record, as I have told counsel before, that if there is nothing shocking or unusual, I will undoubtedly go along with the agreement.

The only inquiry I did not make of Mr. Matthews that does occur to me now, and I might make it by way of inquiry and with explanation—obviously, the agreement that has been made by and between counsel is not binding on the Court, Mr. Matthews.

Are you aware of that?

MR. MATTHEWS: I am, Judge.

THE COURT: However, if the Court for any reason does not see fit to go along with this agreement, I will advise you

of that fact and afford you the opportunity of withdrawing your guilty plea and returning to your not guilty plea.

MR. MATTHEWS: Thank you, Your Honor.

THE COURT: But in the absence, as I say, of anything unusual or something that we are not aware of, the Court will follow the agreement of counsel in accordance with the suggested ABA procedures and the Supreme Court opinions in that regard.

Mr. Matthews, I would urge you to cooperate with the probation officer. Give him as much information as possible. I will ask him for what we could call an abbreviated presentence investigation, but obviously the more material he has, the better and more complete report he can submit to the Court along with his recommendation.

Secondly, at the time the matter is set for sentencing, if you have any additional information or material or statement that you would like to make to the Court, you will certainly be afforded that opportunity and you can make it personally or through your attorney or call any witnesses that you should want to in that regard.

MR. MATTHEWS: Thank you, sir.